THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Jason Nieman, Plaintiff vs. Duane Helton, et. al. (City of Dallas) Defendants	Case No: 3:14 cv 3897 Judge: Hon. Barbara M.G. Lynn Magistrate Judge: Hon. Paul D. Stickney

PLAINTIFF'S REQUEST FOR REVIEW OF THE HONORABLE MAGISTRATE'S ORDER [DKT. 267; 2/28/2017] ON PLAINTIFF'S MOTION [DKT. 259] TO COMPEL PROPER DISCOVERY RESPONSES BY THE INDIVIDUAL CITY OF DALLAS DEFENDANTS HELTON, MERRELL, AND MILAM, AND RELATED MOTION FOR DISCOVERY SANCTIONS, AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND SANCTIONS [DKT. 260]

Comes now Plaintiff Jason Nieman, pro se, respectfully and pursuant to 28 U.S.C. 636)(b)(1) and/or Fed. R. Civ. P. 72, responding and objecting to the *Order* [267; 2/28/2017] of the Honorable Magistrate Judge Paul D. Stickney, denying Plaintiff's motion to compel and for sanctions and granting Defendants' motion for protective order, effectively relieving the Defendants from any discovery obligations in this case. Moreover, the ruling potentially sets the stage for imposition of sanctions if Plaintiff appeals the Honorable Magistrate's ruling.

Plaintiff believes that the District Judge will agree that the ruling is improper in light of the Court's previous activation of discovery, and Defendants' refusal to participate as required under the rules before seeking summary judgment. Moreover, Plaintiff believes that the District Judge will agree that a party should not be sanctioned when they have acted in good faith to comply and when the issues are "fairly debatable", particularly where the orders of the Honorable Magistrate have not been clear or detailed (in specific regard to Rule 33(a)(1)) and where there is no evidence of willful defiance on the part of the Plaintiff.

Plaintiff certifies this pleading compliant with Local Rule 7.1, and 7.2, including the page and formatting limitations of L.R. 7.2(c), (d). This pleading is 10 pages, excluding the Certificate of Service.

RELEVANT PROCEDURAL HISTORY

As the Court is aware, this is a somewhat complex civil rights and tort matter related to the tortuous, unlawful and/or unconstitutional actions of the various Defendants. Plaintiff will not belabor the facts or specifics as the Court has reviewed them many times. That said, the key aspects that remain as to the active defendants relate to (lack of) probable cause for seizure, constitutional violations related to the seizure, restraint, and incarceration in a City of Dallas ambulance and Parkland/UTSW Medical Center in Dallas, and the related actions of the Defendants, particularly including Merrell, Helton, and Milam, prior to and during litigation.

On July 24, 2015 the Honorable Magistrate issued a *Scheduling Order* [Dkt. 118] which activated discovery in this matter, with no enumerated limitations other than time. Plaintiff has worked in good faith for almost two years to get the Defendants to provide rudimentary discovery responses. As the Court is also aware, Plaintiff has been required to file two specific compelling motions in order to try and get the Defendants to provide proper discovery responses. The motion practice can be summarized as follows:

(1) October 2015: Plaintiff served discovery including two sets of interrogatories (one as Plaintiff and one as Counter-Defendant as to the purported 42 U.S.C. 1988 counterclaims). Defendants sought protective order and after full briefing the Honorable Magistrate ordered Plaintiff to limit his interrogatories to 25 under Rule 33(a)(1) and withheld determination as to any limitation on the scope of discovery pending Defendants' promised motion. [*Order*, Dkt. 202; 3/22/2016]. Neither party appealed this ruling.

(2) After serving a revised and singular set of interrogatories (one per party for each Defendant) and after Defendants' counsel claimed numerosity objections Plaintiff was forced to file effectively a second motion to compel [Dkt. 209; 5/13/2016]. This matter was fully briefed and the Honorable Magistrate issued an *Order* [Dkt. 253; 9/30/2016] indicating that Plaintiff's revised interrogatories were still in violation of Rule 33(a)(1)'s numerosity limit but permitting him to re-serve revised interrogatories. Plaintiff timely objected to this ruling and sought District Judge review [Dkt. 255; 9/30/2016] but no ruling has ever been noted on this objection.

(3) So as not to waive his right to discovery, Plaintiff also promptly revised the interrogatories interrogatories yet again, cutting them down to the bare minimum. Despite this, Defendants' counsel again claimed numerosity violation, at least as to Defendants Helton and Milam which forced Plaintiff to file another motion to compel after Defendants' counsel refused Plaintiff's suggestion that Helton and Milam respond to the number that they believed reached 25 and then stop, with numerosity objections preserved. See *Motion,* [Dkt 259; 11/1/2016]. Defendants responded with another motion for protective order and sanctions and the matter has been fully briefed. On this date, the Honorable Magistrate issued another *Order*]Dkt. 267; 2/28/2017] which denied Plaintiff's motion to compel and granted Defendants' motion for protective order. The very short order reads as follows:

"This case has been referred to the United States Magistrate Judge for pretrial management. Before the Court are Jason Nieman's ("Plaintiff") Motion to Compel Proper Discovery Responses by the Individual City of Dallas Defendants Helton, Merrell, and Milam (collectively, "Defendants"), and Related Motion for Discovery Sanctions and/or Civil Contempt Finding [ECF No. 259] ("Motion to Compel"); and Defendants' Motion for a Discovery Protective Order [and] Motion for Imposition of Sanctions [ECF No. 260] ("Motion for Protective Order"). As Defendants point out, this is the third round of discovery motions that have been filed in connection with interrogatories Plaintiff initially served

Defendants on July 27, 2015. Defs.' Resp. 2-4, ECF No. 260; Orders, ECF Nos. 202 & 253. Plaintiff was informed by the Court on March 22, 2016 and on September 30, 2016 that he must comply with Federal Rule of Civil Procedure ("Rule") 33(a)(1) in connection with these interrogatories. Orders, ECF Nos. 202 & 253. However, Plaintiff still fails to comply with Rule 33(a)(1). See Defs.' Resp. 7-13, ECF No. 260. Therefore, Plaintiff's Motion to Compel [ECF No. 259] is DENIED, and Defendants' Motion for Protective Order [ECF No. 260] is GRANTED. Defendants are relieved of any further obligation to answer the interrogatories at issue. With respect to Defendants' request for sanctions, Defendants ask that the Court order them to file a costs memorandum and a supporting affidavit, and allow Plaintiff to object, if the Court is inclined to award sanctions. Defs.' Resp. 23, ECF No. 260. Upon consideration, Defendants are ordered to file a cost memorandum and a supporting affidavit detailing the costs incurred to date, if Plaintiff persists with these interrogatories, thereby causing further motion practice on the topic."

Just as in the prior *Order* [Dkt. 253], the Honorable Magistrate provides no specific explanation as to how or why Plaintiff's interrogatories are non-compliant with Rule 33(a(1). Moreover, while relieving Defendants from any responsibility to provide interrogatory responses the Court has told Plaintiff that if he appeals the ruling that he will face sanctions.

It is also arguably relevant that several weeks ago, on February 6, 2017, the Honorable Magistrate issued his *Findings, Conclusions and Recommendations* [Dkt. 264] which recommended entry of summary judgment and/or 12(b)(6) dismissal in favor of the Defendants. Plaintiff timely objected [Dkt.265], including an updated Rule 56(d) affidavit. Yesterday, Defendants' filed an arguably improper and untimely "response". [Dkt. 266]. Simply put, the Honorable Magistrate recommended entry of summary judgment nearly a month before relieving the Defendants of their interrogatory responsibilities.

ARGUMENT

As a preliminary note, Plaintiff is mindful of the Honorable Magistrate's apparent threat to sanction Plaintiff if he appeals the *Order* [Dkt. 267]. That said, Plaintiff also knows that if he does not seek review, and if the District Judge or 5th Circuit ultimately rule against Defendants on dispositive motion, Plaintiff could effectively waive his rights to discovery if he does not appeal the *Order*. *See, e.g., Nettles v. Wainwright.* 677 F.2d 404, 408 (5th Cir. 1982), *Douglass v. U.S.A.A.*, 65 F.3d 452 (5th Cir. Oct. 2, 1995). As such, this is a required filing.

As the Court can see, pursuant to the Court's instructions in its *Orders* [Dkt. 202, 253] Plaintiff twice amended his initial interrogatories, serving only one set per Defendant, and serving less than 20 enumerated interrogatories to leave a buffer as to arguments (frivolous or otherwise) by City Attorney Schuette that the numerosity limit had been exceeded. Despite this, Defendants and Schuette refused to answer *any* of the interrogatories (1st amended) and then as to Helton or Milam (2nd Amended). In *Factory Air Conditioning Corp. v. Westside Toyota, Inc.*, 579 F.2d 334 (5th Cir. Aug. 30, 1978) the court affirmed an order of sanctions in a case with similar behavior. The underlying court in that case stated clearly, that *"the objections Defendant has lodged to certain specific interrogatories do not excuse it from answering other interrogatories in accordance with Rule 33(a), F.R.Civ.P. In this connection, Defendant's blanket objection to the interrogatories on the grounds that their numerosity makes them oppressive is unacceptable."* The 5th Circuit stated, in relevant part:

> *"On the basis of these facts, which appear on the record, the Court finds that it must grant Plaintiff's motion for judgment and deny Defendant's motion for relief from sanctions. To do otherwise would be an open admission by this Court that it can do nothing when a party in a civil suit deliberately flouts its orders. See National Hockey League v. Met. Hockey Club, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)."*

As the Court is aware the Supreme Court has recognized that the qualified immunity defense is intended to shield a defendant from "unnecessary and burdensome discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). The defense of qualified immunity does not necessarily bar all discovery; rather, limited discovery may be appropriate in some instances. *Rome v. Romero*, 225 F.R.D. 640, 644 (D. Colo. 2004); see also *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987). However, at the time that they were ordered to provide interrogatory responses the Defendants' motion for protective order as to qualified immunity had been *denied*, and they never objected to the *Order* [Dkt. 253].

I. The Court's Ruling As to Rule 33(a)(1) Violations Constitute Clear Error

As the Court can see, just as in the prior *Order* [Dkt. 253] the current *Order* [267] provides no specificity at all as to *how* Plaintiff's 2nd amended interrogatories are violative of the rule in letter or sprit. The majority position holds that the limit applies per party, not action and Defendants appear to concede this by having Merrell provide responses. See, e.g., *St. Paul Fire and Marine Insurance Co v Birch, Stewart Kolasch & Birch, LLP*, 217 FRD 288, 289 (D Mass 2003); James W. Moore, 7 Moore's Federal Practice § 33.30[1] at 33-33 (Matthew Bender 3d ed 1997 & Supp 2004). With the 2nd set, the interrogatories numbered only 18, 17, and 19 (well under the stated limit of 25). With the 3rd set the interrogatories numbered only 14 as to Helton and Milam and 12 as to Merrell. Notwithstanding, Defendants claimed that because of "discrete subparts" the interrogatories violated Rule 33(a)(1) and Judge Stickney appears to have agreed, providing no specificity as to that determination or basis. Plaintiff showed that he provided support to counsel and worked exhaustively prior filing his motion: [Dkt. 269-6]:

"Note that Federal Practice and Procedure commentators Wright, Miller and Marcus have construed the judiciary advisory committee's guidance to mean that "an interrogatory containing subparts directed at eliciting details concerning a common theme should be considered a single question," while an interrogatory with "subparts inquiring into discrete areas is likely to be counted as more than one for purposes of the limitation." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2168.1, at 261 (2d ed. 1995). See also, e.g., Cardenas v. Dorel Juvenile Grp., Inc., 231 F.R.D. 616, 619-20 (D. Kan. 2005). Any alleged subparts of an interrogatory that constitute a common theme are one interrogatory under Rule 33(a)(1).

*Most federal courts use the "related-question" test in determining whether interrogatory subparts are discrete. See, e.g., Perez v. Aircom Mgmt. Corp., No. 12-60322-CIVWILLIAMS/SELTZER, 2012 U.S. Dist. LEXIS 136140, at *2 (S.D. Fla. Sept. 24, 2012) ("District courts in the Eleventh Circuit, like most district courts in other circuits, have adopted and applied 'the "related question" test to determine whether the subparts are discrete, asking whether the particular subparts are "logically or factually subsumed within and necessarily* *related to the primary question.'" (quoting Mitchell Co. v. Campus, No. CA 07-0177-KD-C, 2008 U.S. Dist. LEXIS 47505, at *42 (S.D. Ala. June 16, 2008))); Hasan v. Johnson, No. 1:08-cv-00381- GSA-PC, 2012 U.S. Dist. LEXIS 21578, at *12–13 (E.D. Cal. Feb. 21, 2012) ("Although the term 'discrete subparts' does not have a precise meaning, courts generally agree that 'interrogatory subparts are to be counted as one interrogatory . . . if they are logically or factually subsumed within and necessarily related to the primary question.'" (quoting Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998))); Imbody v. C & R. Plating Corp., No. 1:08-CV-00218, 2010 U.S. Dist. LEXIS 12682, at *2 (N.D. Ind. Feb. 12, 2010) ("Interrogatory subparts are to be counted as one interrogatory if they are logically or factually subsumed within and necessary related to the primary question.").*

In a recent ruling, Klein v. Federal Insurance, 7:03-CV-102 (N.D. Tex. July 14, 2014) this same court clarified the standard:

*Interrogatory subparts are to be counted as discrete subparts only if they are not "logically or factually subsumed within and necessarily related to the primary question." Krawczyk v. City of Dallas, 2004 WL 614842, at *2 (N.D. Tex. Feb. 27, 2004) (Ramirez, J.) (citation and internal quotation marks omitted). "A single interrogatory that seeks information about related aspects of a party's claim does not necessarily contain discrete subparts that must be counted separately for purposes of Rule 33." Faglie v. Meritage Homes of Tex., LLC, 2013 WL 1608727, at *2 (N.D. Tex. Apr. 15, 2013) (Stickney, J.)*

Notwithstanding, should you and your clients elect to continue this line of argument, it would seem that you and they should respond, under oath (penalty of perjury) to the interrogatories beginning with the first, and continue until you and/or they believe that Rule 33(a)(1) permits you to discontinue answering the remainder. In light Court's standing order, unless overruled by Judge Lynn, it is unlikely that you or your clients will be deemed to have waived a numerosity objection by answering interrogatories until you reach the limit of 25, if you truly believe you have a legitimate argument in limiting responses as to the properly served, amended, interrogatories. However, given how severely I was forced to reduce them yet again, pursuant to the Magistrate's Order, it is also quite possible that the Court will construe any numerosity objection as to this set to be objectively frivolous or a matter of subjective bad faith as to Fed. R. Civ. P. 11(b), 18 U.S.C. 1927, and/or the inherent authority of the Court. See, Chambers v. NASCO, Inc., 501 U.S. 32 (1991)"

In light of the Court's standing orders on qualified immunity and failure of the Court to cite any basis for Defendants to refuse to respond based upon attorney-client or work product privileges, there is simply no reasonable question that Plaintiff is entitled to basic interrogatory responses in this action, verified under penalty of perjury, pursuant to Rule 33, and that either his 1st or 2nd amended (and greatly truncated) interrogatories were compliant with Rule 33(a)(1).

II. Barring Plaintiff From Discovery As a Sanction Abuses Discretion

As the Court is aware, the Federal District Courts enjoy broad discretion as to discovery and to sanction non-complaint conduct. See, e.g., *Heller v. City of Dallas,* No. 3:13 cv 04000 (N.D. Tex. Nov. 11, 2014). Certainly, if there was evidence that Plaintiff was openly defiant of the rules or the Honorable Magistrate's orders then sanctions would be warranted. However, the Judge Stickney makes no such determination nor would such a finding be supported. For example, Plaintiff's 1st revised interrogatories to Helton numbered 3424 words and the 2nd revised numbered 3068 words. Plaintiff did not simply force the same items into a smaller number of interrogatories; but rather he actually edited them down in good faith yet again.

Moreover, barring a party from taking an entire aspect of discovery (while concurrently recommending entry of dismissal and/or summary judgment) is arguably an action awarding default to the Defendants as a sanction. See, e.g., *United States v. $49,000 Currency*, 330 F.3d 371, 376 (5th Cir. 2003) (citing *Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998)). "[W]here a district court awards default judgment as a discovery sanction, two criteria must be met." Id. (citation omitted). "First, the penalized party's discovery violation must be willful." Id. (citation omitted). Second, "the drastic measure is only to be employed where a lesser sanction would not substantially achieve the desired deterrent effect." Defendants have not argued, nor has the Honorable Magistrate, that Plaintiff has acted in willful defiance of any rule or order. The Court merely states that Plaintiff's interrogatories are still somehow in violation of the numerosity limit of Rule 33(a)(1), without any specific assertion as to how.[Dkt. 267 at page 1].

III. The Potential Award of Costs Constitutes an Abuse of Discretion

As the Court is aware, while the federal courts enjoy various other powers the most common and specific ones related to discovery sanctions fall under Rule 37. In this case, Plaintiff showed that Defendants and counsel refused to provide any interrogatory responses as to Helton or Milam but did not file a timely protective order motion, in violation of the clear and ambiguous terms of Rule 37(d)(2). Rule 37 also states very clearly that a prevailing party should not be entitled to costs of the motion if the objection was "substantially justified". The key question here, never resolved by the Court in any detail, is whether or not Plaintiff's interrogatories (1st and/or 2nd revised versions; 2nd at Dkt. 259-1 to 259-3) truly violate Rule 33(a)(1). The *Order* [Dkt. 267] also appears to be excessive as to the powers granted under Rule 26(c). The Court has not ruled that barring any and all interrogatories from Defendants Helton and Milam is warranted to prevent "annoyance, embarrassment, oppression, or undue burden or expense" simply because they are claimed to be numerically violative.

In order to sanction the Plaintiff and award costs to the Defendants as to the compelling/protective order motion(s), which the Honorable Magistrate has effectively done, the Court is also arguably required to make a determination that Plaintiff's move to compel responses, and/or arguments that his 1st and/or 2nd revised interrogatories to Helton and Milam were compliant under Rule 33(a)(1) were not substantially justified. The Court has made no such determination, nor is one proper. Respectfully, Plaintiff sought, but never received, guidance from the Court as to what changed he needed to make to ensure that his revised interrogatories were compliant with the Court's interpretation of Rule 33(a)(1). Additionally, Plaintiff showed that he attempted to confer in good faith and offered reasonable alternatives (answering up to the perceived 25 limit, preserving numerosity objections) which Defendants and counsel refused.

The ruling of Magistrate Judge Horan in *Holmes v. N. Tex. Health Care Laundry Coop. Assn'n,* 3:15-cv-2117 (N.D.Tex Apr. 6, 2016) shows the kind of detailed review and specificity that generally is used to support a finding of sanctions. Conversely, in this case Defendants and counsel refused to provide any responses to the 2nd amended interrogatories directed to Helton and Milam. This kind of conduct (arguably defiant of an express order of the court) is consistent with Rule 37 sanctions. *See, e.g., F.D.I. C. v. Sartain*, 20 f.3d 1376 (5th Cir. May 25, 1994).

CONCLUSION

For these good reasons and other good reasons the Court may view on its own authority, Plaintiff believes that the Honorable Magistrate's *Order* [Dkt. 267] should be reversed, Plaintiff's compelling motion should be granted, and that these Defendants should be ordered to provide complete and proper responses to Plaintiff's properly formatted, timely served, and otherwise proper discovery requests, and that any potential sanction against Plaintiff be quashed as to the compelling/protective order motions at issue.

Respectfully submitted this February 28, 2017

/s/ Jason Nieman
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CERTIFICATE OF SERVICE

Jason Nieman, *pro se*, certifies that on this date (February 28, 2017) he electronically filed a true and correct copy of this pleading and exhibits with the clerk of the court for the Northern District of Texas, at Dallas, by way of the Court's ECF/CM system.

All relevant Defendant(s) have appeared by counsel and should receive copies of this pleading and supports by way of the ECF/CM system, specifically including:

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